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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 105 of 2005

Shailendra Kumar Jurri

Versus

State of Chhattisgarh

Criminal Appeal No. 165 of 2005

Ishwar Kawde & another

Versus

State of Chhattisgarh

&

Criminal Appeal No. 253 of 2005

Ishwar Kawde & two others

Versus

The State of Chhattisgarh

JUDGMENT

Post for : 24.05.2007

Sd-
Sunil Kumar Sinha
Judge
23.05.2007

AIR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 105 of 2005

APPELLANT Shailendra Kumar Jurri, S/o Garibram Jurri, aged about 20-21 years, R/o village Telgara, P.S. Charama, District North Bastar Kanker (C.G.)

Versus

RESPONDENT State of Chhattisgarh through the police station Charama, District North Bastar Kanker (C.G.)

Criminal Appeal No. 165 of 2005

APPELLANTS **1)** Ishwar Kawde, Aged about 25-26 years, S/o- Risauram, Occupation- Agriculture, R/o Komalpur, P.S. Kanker, Distt. Kanker (C.G.)

2) Santosh Kumar, Aged about 25-26 years, S/o- Sukhlal, Occupation- Agriculture, R/o- Komalpur, P.S. Kanker, Distt. Kanker (C.G.)

Versus

RESPONDENT State of Chhattisgarh, Through-P.S. Charama, District North Bastar Kanker (C.G.)

&

Criminal Appeal No. 253 of 2005

APPELLANTS **1)** Ishwar Kawde, S/o Risauram, Aged about 25-26 years, Occupation- Agriculturist, R/o Komalpur, P.S. Kanker

2) Santosh Kumar, S/o Sukhlal, Aged about 25-26 years, Occupation- Agriculturist, R/o Komalpur, P.S. Kanker

3) Brijlal, S/o Ram Singh, Aged about 18-19 years, Occupation Labour, R/o Hatbharan (Bharwand) Police Chowki Kundai, P.S. Raidhar, Distt. Nawrangpur (Orissa)

Versus

RESPONDENT The State of Chhattisgarh, Through P.S. Charama, District North Bastar Kanker

(Appeals under Section 374 (2) of Cr.P.C.)

Appearance:

Shri Vishnu Koshta, Advocate, appears for the appellant in Cr.A. No. 105/2005, Shri Pawan Shrivastava, Advocate appears for the appellants in Cr.A. No. 165/2005 & Shri Gautam Khetrapal, Advocate appears for the appellants in Cr.A. No. 253/205.

Shri D.K. Gwalre, Additional Public Prosecutor, appears for the State in all the 3 appeals.

JUDGMENT
(24.05.2007)

Sunil Kumar Sinha, J.

1. These appeals have been directed against the judgment of conviction and order of sentence dated 4.1.2005 passed in Special Case No. 22/2004 by the Special Judge, Narcotic Drugs and Psychotropic Substances Act, 1985 (For short N.D.P.S. Act or the Act), Bastar at Jagdalpur, whereby, the said Court after holding the appellants guilty of offence punishable under Section 20 (b) (ii) (C) of the N.D.P.S. Act, sentenced them to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/-, in default of payment of fine to further undergo R.I. for 5 years.

2. At the very outset, Shri Gautam Khetrapal, learned counsel for the appellants in Cr.A. No. 253/2005, submits that he is not pressing this appeal on behalf of appellants- Ishwar Kawde and Santosh Kumar because earlier to this appeal, Cr.A. No. 165/2005 was filed on their behalf. In view of the above, Cr.A. No. 253/2005, so far as it relates to appellants No. 1 & 2 therein i.e. appellants- Ishwar Kawde and Santosh Kumar is dismissed as not pressed. Now Cr.A. No. 253/2005 shall stand for appellant No.3 only i.e. Brijlal.

3. The brief facts are that in the intervening night of 5th–6th May 2004, the Flying Scott of forest department was checking various vehicles near forest barrier, Charama. At about 3.45 a.m., a vehicle (Tata Sumo) bearing registration No. MP-63/D 0008 came over there. The four appellants were the occupants of the vehicle. The vehicle was being driven by appellant-Shailendra Kumar Jurri. When a search was made by the Dy. Ranger namely- K.S. Thakur (P.W.-3), *Ganja* in quantity of 24 Kg. was found kept in the vehicle. P.W.-3- K.S. Thakur prepared a *Talashi Panchnama* (Ex-P/1) and he also prepared a seizure memo (Ex.-P/9). The aforesaid search and seizure memos were prepared in presence of 2 *Panch* witnesses namely- Sobharam and Roop Singh (P.W.-1 & P.W.-2). The accused persons were also arrested by the said forest officer and the exercise undertaken about search and seizure by the Dy. Ranger- K.S. Thakur (P.W.-3) was informed to the range officer- L.K. Choudhary (P.W.-8), who in turn wrote a memo dated 6.5.2004 to the S.H.O. police station, Charama, which was received by Sub-Inspector- K.R. Karsaal (P.W.-4) based on which a F.I.R. vide Ex.-P/14 was lodged by him. The Investigating Officer, K.R. Karsaal (P.W.-4), prepared a seizure memo Ex.-P/8 and on production of vehicle, *Ganja* in quantity of 24 Kg and an index along with various documents showing the investigation conducted by the forest department, seized them from the possession of Ranger- L.K. Choudhary (P.W.-8). Thereafter, *Ganja* was taken into custody of the police department and after

its measurement and further after taking out samples, it was sealed and was kept in safe custody. The accused persons were arrested and an information to this effect was sent to higher authority. The samples were sent for chemical examination to Forensic Science Laboratory, Raipur on 11.5.2004, from where the report was received, according to which, the articles seized were *Ganja*. After completion of usual investigation as stated above, the charge-sheet was filed.

4. Learned Special Judge, held that the *Ganja* in commercial quantity was seized from the aforesaid vehicle of which the appellants were occupants, therefore, they were liable for punishment under Section 20 (b) (ii) (C) of the N.D.P.S. Act and sentenced them as aforementioned. The *Ganja* was directed to be confiscated and for the vehicle, it was directed that a separate proceeding be drawn under Section 60 (3) of the N.D.P.S. Act. It is against this judgment of conviction and order of sentence, the appellants have filed these criminal appeals.

5. Learned counsel for the appellants raised two fold arguments. Their first submission was that there was non compliance of mandatory provisions of Section 42 (1) of the N.D.P.S. Act as the proceedings of search and seizure were completed by the forest officers, who were not the empowered officers under the N.D.P.S. Act, therefore, the entire proceeding vitiates. They secondly argued that so far as the police officer is concerned, he has seized the *Ganja* and the vehicle from the possession of the forest officer, therefore, there is no

independent recovery from the appellants and recovery so made cannot be attributed to them, particularly, when both the witnesses of recovery namely- Sobharam & Roop Singh (P.W.-1 & P.W.-2) have turned hostile and they have not supported the case of prosecution, so far as the alleged search and seizure from the accused persons are concerned.

6. On the other hand, learned counsel for the State opposed these arguments and supported the judgment passed by the Special Court. He raised the points that since there was no prior knowledge or information about contraband, therefore, the provision of Section 42 of the said Act would not be applicable.

7. I have heard learned counsel for the parties at length and have also perused the records of the special case.

8. The Apex Court in the matter of ***State of Punjab –Vs- Balbir Singh, AIR 1994 SC 1872***, dealing with the provisions of Sections 41 (1), 41 (2), 42 (1), 42 (2) along with other Sections of the N.D.P.S. Act, set out the following conclusions:

> **(1)** If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psycotrophic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out

the investigation in accordance with the other provisions of the NDPS Act.

(2A) Under Section 41 (1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal.

Likewise only empowered officers or duly authorized officers as enumerated in Ss. 41 (2) and 42 (1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.

(2B) Under Section 41 (2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2C) Under Section 42 (1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42 (1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42 (2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4A) If a police officer, even if he happens to be an

"empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165, Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4B) If an empowered officer or an authorized officer under Section 41 (2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165, Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information, the empowered officer or authorized officer while acting under Sections 41 (2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

9. In the matter of ***Beckodan Abdul Rahiman –Vs- State of Kerala, AIR 2002 SC 1810***, the Apex Court held that keeping in the mind the grave consequences which are likely to follow on proof of possession of illicit articles under the Act, namely, the

shifting of the onus to the accused and severe punishment to which he becomes liable, the Legislature has enacted and provided certain safeguards in various provisions of the Act including Ss. 42 and 50 of the Act. The harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and compliance of the safeguards. In the said case after recording the information, the witnesses has not shown to have complied with the mandate of sub-section (2) of S. 42 of the Act. Similarly the provisions of S. 50 were not complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate. The Court said that the compliance of S. 50 cannot be held to have been fulfilled on officer asking the accused "whether I should search him in the presence of senior officers or Gazetted Officer". The Court said that the accused was required to be apprised of his right conferred under S. 50 giving him the option to be searched in presence of gazetted officer or the Magistrate. The accused has not been shown to be apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate. The Apex Court said that the provisions of sub-sec. (2) of S. 42 and the mandate of S. 50 were not complied with by the prosecution which rendered the case as not established and in view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. In this case, the Apex Court has referred to the decision of *Balbir Singh's* case (supra) and has also

referred to the decisions of ***State of Punjab –Vs- Baldev Singh, AIR 1999 SC 2378*** and ***Saiyad Mohd. Saiyad Umar Saiyad – Vs- State of Gujrat, 1995 AIR SCW 1852***.

10. A perusal of Sections 41 (2) and 42 (1) of the N.D.P.S. Act would show that only the empowered officers or the authorized officers as enumerated in these sub-sections can take down the procedure of search and seizure under the N.D.P.S. Act and if the search and seizure is made by the officers, who are not authorized or empowered under the N.D.P.S. Act, the same would render illegal. The safeguards in the nature of these provisions are intended to protect the person against false accusation and also to give credibility to the search and seizure conducted by the empowered officer and if the empowered officer fails to comply with the mandatory requirements of the N.D.P.S. Act, the prosecution is to suffer the consequences thereof.

11. In the present case, admittedly, the search and seizure was made by the officers of the forest department, who were not the empowered officers or duly authorized officers under the N.D.P.S. Act. What has happened is that they were making a general checking at the out-post, Charama, during which, they also checked the said Tata-Sumo, in which, the contraband (*Ganja*) was found. According to K.S. Thakur (P.W.-3), when the *Ganja* was found in search, he took it in possession and at about 7.00 a.m., it was taken to a *Kirana* shop for measurement. He has deposed vide Para-5 that he has also prepared the *Talashi Panchnama* of the vehicle (Ex.-P/1) at 4.00 a.m. when it

was intended to be searched. He has further deposed that he had made a *Tol Panchnama* also vide Ex.-P/2 and had seized the contraband by preparing a seizure memo vide Ex.-P/9. Not only this, at about 8.15 a.m. on 6.5.2004 that means after preparing these documents, he had arrested the accused persons and had prepared their arrest memos vide Ex.-P/10, Ex.-P/11, Ex.-P/12 & Ex.-P/13 and thereafter an oral information in this regard was given by him to range officer L.K. Choudhary (P.W.-8).

12. Mr. L.K. Choudhary (P.W.-8) deposed that he had given a written report (Ex.-P/14) of the incident to the police station-Charama on 6.5.2004 at 9.00 a.m. While giving the report, he had also handed over the vehicle as well as contraband and according to the list, annexed to the report, documents 1 to 8 were also handed over by him. Vide para-11 of his examination-in-chief, he has admitted that the officers of the forest department were having no authority to draw the proceeding under the N.D.P.S. Act.

13. The above fact has not been disputed by the prosecution. The question arises as to whether the mandatory provisions of Sections 41 (1) & 42 (1) were complied with in this case or not ? and what procedure should have been adopted by the forest authorities when a discovery of contraband was made by them ?

14. Admittedly, this was a case of chance recovery as none of the officers said that they were having any information regarding transportation of *Ganja* by the said vehicle and in fact, while

they were making search for forest produce, the *Ganja* was discovered by them. So far as the provisions of Sections 41 (1) & 42 (1) of N.D.P.S. Act are concerned, as is clear from the language of sections itself and also from the judgment of the Apex Court rendered in the matter of *Balbir Singh* (supra), these provisions are mandatory and contravention of the same would affect the prosecution case and vitiates the trial. Under the procedure laid down in the N.D.P.S. Act, only the authorized officer and the empowered officer are to undertake the exercise of search and seizure, which admittedly the forest officers were not, therefore, it is clear that the mandatory provisions were not complied with in this case.

15. About the procedure in a chance recovery, the Apex Court laid down in the matter of *Balbir Singh* that if a police officer, without any prior information as contemplated under the provisions of the N.D.P.S. Act, makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage S. 50 of the N.D.P.S. Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the N.D.P.S. Act. The Apex Court has further said that if the

police officer happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the N.D.P.S. Act.

16. In the present case, when the forest officers came to know that there was *Ganja* in the vehicle and they were faced with instance chance recovery, then it was incumbent upon them to inform the empowered officer who should have immediately taken the charge of investigation and should have proceeded with further investigation in accordance with the provisions of N.D.P.S. Act. Admittedly this was not done by the forest officers and they themselves stepped into further investigation and proceeded with making seizure memo, *Tol Panchnama*, and affecting the arrest of the accused persons and thereafter on the next morning, when the investigation was completed by them accused persons along with vehicle and contraband were handed over by them to the police. Thereafter, the police officer made another recovery memo under Ex.-P/8 and took the above articles along with 8 documents in his possession.

17. The contents of the Ex.-P/8 would show that the said seizure was made from the possession of L.K. Choudharay (P.W.-8) again in the presence of same *Panch* witnesses namely-Sobharam & Roop Singh, before whom the seizure by the forest officers were made. That is to say that even if we take the seizure by police officer as an independent seizure, it is clear that the same was made from the possession of forest officers, not from the possession of the accused persons. That means nothing was

done by the empowered officer or the authorized officer and after doing formal investigation only, the charge-sheet was filed by them. Therefore, it is clear that the mandatory provisions of Sections 41 (1) & 42 (1) have not been complied with and even the seizure of the contraband from the possession of the appellants by the empowered officer has not been proved as the same was physically seized from the forest authority and even otherwise also, a possibility of false implication by a 3rd agency cannot be fully ruled out in this case.

18. Therefore, the prosecution has not been able to prove that the mandatory provisions were complied with and that in fact, the *Ganja* was seized from the possession of the appellants by the empowered officer.

19. In the result, the appeals are allowed. The conviction and sentences awarded to each of the appellants are set aside. They are acquitted for the charges framed against them.

Sd-
Sunil Kumar Sinha
Judge

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